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ABSTRACT

The paper interprets the legal meaning and application of the "least restrictive environment" (LRE) principle in the education of handicapped, and particularly deaf children. The role of the Department of Education in interpreting the intent of the Education for All Handicapped Children Act, is reviewed with emphasis on the "core value" of LRE. Also examined is congressional intent in the original law. Federal court interpretations of LRE are examined including the following cases: Roncker v. Walter, A.W. v. Northwest RI. School District, and Geis v. Bd. of Education. Specific decisions on LRE and deaf children reviewed include Springdale School District v. Grace, and Visco v. School District of Pittsburgh. The paper stresses that the goal of educating students in the least restrictive environment should be secondary to the goal of providing an appropriate education that meets the unique needs of each handicapped child. (DB)

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WHAT DOES LRE MEAN?

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One of the goals of the Education for All Handicapped Children Act (Act) is that handicapped children are educated with nonhandicapped children "to the maximum extent appropriate."[1] The concept of educating children in the least restrictive environment (LRE) has provoked more controversy and confusion than any other issue in special education. As the Commission on Deaf Education (Commission) found: "Parents, deaf consumers, and professional personnel of all persuasions have, with almost total unanimity, cited LRE as the issue that most thwarts their attempts to provide an appropriate education for children who are deaf."[2]

"CORE VALUE"

Part of the reason for this discontent has been the extremist position taken by the U.S. Department of Education (DOE) on the implementation of LRE. The Department of Education has enforced a policy based upon the philosophical premise that LRE is the "core value" of special education. On January 8, 1985, Assistant Secretary of Education Madeleine Will stressed her commitment to LRE:

> Education in the...[LRE] is what I envision as the last barrier to full implementation of Public Law 94-142. This concept is becoming the cornerstone upon which federal special education policy is being built. It certainly is the core around which my own beliefs about special

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[1] 20 U.S.C. §1412(5).

[2] Toward Equality, The Commission on Education of the Deaf, p.25 (Feb. 1988).

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> education have evolved in terms of early childhood programming, school age programming, transition services and adult services. In my own mind all have evolved with the concept of least restrictive environment as the core concept.[3]

DOE's emphasis on LRE as the "core value" has turned a congressional preference into a requirement. DOE's position has been made clear to state and local education administrators through compliance reviews, monitoring, and manuals.

The initial absolutist position of DOE was met with a chorus of concern by parents, professionals in deaf education and deaf consumers. They perceived the LRE focus as a threat to specialized deaf programs. DOE attempted to assure these groups there was still some place for specialized and residential programs for deaf children. Assistant Secretary Will acknowledged: "In some cases, separate environments have been recognized as the least restrictive for some individual children. We recognize that inherent in a free appropriate public education is a continuum of services, including separate facilities, both public and private."[4] However, DOE continues to emphasize LRE as a primary consideration in placement decisions.

DOE has enforced the "core value" concept with a zeal reminiscent of the movement for deinstitutionalization of mental patients. In both cases the previous practice had been to place

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[3] Toward Equality, at p.26.

[4] Ibid at 33.

disabled people in separate environments--too often "out of sight and out of mind". In the mental health area, litigation to provide treatment in the least restrictive environment led many states to open the doors of their institutions and empty their patients into the community. The concept was to move mental patients toward the community by placing them in unrestricted settings such as group homes, where they could become more self-sufficient and independent. To be successful, this concept requires community resources. Where there was a carefully thought-out movement from the institution to community support services, there was success. Where there was indiscriminate dumping, there was and is failure. Many legislators and administrators thought they could both achieve the lofty goal of integration into society and the economic goal of saving costs. Because it is expensive to maintain institutions, decision-makers had a real incentive, in an era of tightening budgets, to support massive deinstitutionalization. The failures of indiscriminate deinstitutionalization are seen every day among the homeless in our large cities.

CONGRESSIONAL INTENT

Similarly, handicapped children were segregated and kept out of regular public education systems. Senator Robert Stafford (R Vt.), one of the original sponsors of the Education for All Handicapped Children Act of 1975, pointed out that Congress "had a view of integration with non-handicapped children as the governing principle,

especially where there is clear evidence that just the opposite was what was occurring in the past."[5] Congress put in a preference for integration by requiring in Section §1412(5) of the Act that states establish:

> [P]rocedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[6]

Senator Stafford explained that Congress realized integration might not be possible for many handicapped children. He stated: "We recognized, [however,] that there are many instances when it would be harmful to a handicapped child to force him or her into a regular classroom situation. (see HR Rep. No. 94-332, 94th Cong. 1st Sess. 9 (1975)). This is a decision which should be reached during the construction of the individualized education plan." [7]

Chief Justice William Rehnquist speaking for the majority of the Supreme Court in the Rowley case, interpreted the Act in the same way:

> Despite this preference for 'mainstreaming'

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[5] Stafford, Education for the Handicapped: A Senator's Perspective, 3 Vermont Law Review 71 at 76 (1978).

[6] 20 U.S.C. §1412(5).

[7] Stafford, at 76.

> handicapped children--educating them with non-handicapped children--Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that the "nature or severity of the handicap may be such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The Act thus provides for the education of some handicapped children in separate classes or institutional settings.[8]

The Regulation implementing the Act reinforces this individualized approach to a placement decision. The Regulation states: "The overriding rule in this section is that placements must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to secure that each handicapped child receives an education which is appropriate to his or her individual needs".[9]

By using this language, the Department of Education has acknowledged that alternative placements, including residential placements, must be made available. However, DOE considers the continuum of alternative placements to be a cascading hierarchy from regular classroom to segregated residential institutions. A residential placement is viewed as the most restrictive environment, with the assumption that it is also the least desirable placement for a handicapped child. The Commission on Deaf Education suggested that

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[8] Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 at 181 n. 4 (1982).

[9] Comment to 34 C.F.R. 300.552.

one way to avoid this interpretation is to view alternative placements as a circle, in which placement is chosen on the basis of individual need.

It is difficult to avoid DOE's hierarchy of placements, since it is based on the congressional mandate that handicapped children should be educated with non-handicapped children to the maximum extent appropriate. What DOE misses is the balancing emphasis on whether or not a handicapped child will receive an appropriate education satisfactorily in a setting with non-handicapped children. This assessment can only be made by looking at an individual child's educational goals, some of which may be achieved only in specialized programs. A child's overall educational program includes language development, social/emotional development, peer interaction, availability of handicapped adult role models, specialized vocational training and counseling and a host of other factors in addition to basic academic skills. For a deaf child, an appropriate education may well require educational resources that are only available in specialized programs.

FEDERAL COURT INTERPRETATIONS OF LRE

The federal courts have provided some guidance on how to analyze LRE when making placement decisions. However, there is no clear black-and-white rule. Judges' decisions on placement often turn on the individual facts in the case before them.

The federal appeals court decision in Roncker v. Walter is most

often cited for its discussion of how to evaluate LRE. A majority of that appeals panel stated:

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. See Age v. Bullitt County Schools, 673 F.2d 141, 145 (6th Cir. 1982). Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such alternative placements benefits all handicapped children.[10]

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[10] 700 F.2d 1058 at 1063 (6th Cir. 1983), cert. denied, 464 U.S. 864 (1983). EHLR 554:381, at 384 (6th Cir. 1983).

In this particular case, a severely mentally retarded student was placed in a special classroom in a regular school rather than in a separate school for the mentally retarded.[11]

Another appeals court has adopted the Roncker analysis of LRE, but reached an opposite result. In A.W. v. Northwest RI. School District[12], the appeals court refused to pull a teacher out of a residential program to teach one mentally retarded student in a regular school. The court found that cost was a legitimate factor for the school system to consider and that the state could allocate scarce funds among as many handicapped children as possible. The appeals court held that §1412(5) "significantly qualifies the mainstreaming requirement by stating that it should be implemented 'to the maximum extent appropriate' and that it is inapplicable where education in a mainstream environment cannot be achieved satisfactorily."[13]

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[11] The dissenting judge in Roncker disagreed with that interpretation of the Act and wrote:

> [The Act] does not require that classrooms for the severely mentally retarded, such as Neill Roncker, whose only interaction with non-handicapped children is to observe them, be located in the regular elementary school. Rather, this section is directed to the handicapped child who can spend some time in the regular classroom if given special aids or assistance.

EHLR 554 at 386.

[12] 813 F.2d 158 (8th Cir.) (1987), cert. denied, 108 S.Ct. 144 (1987), EHLR 558:294 (8th Cir.) (1987).

[13] 813 F.2d at 163, EHLR 558 at 299.

Another federal court of appeals took a different approach. The Third Circuit in Gei[illegible] v. Bd. of Education, (1985), found that in determining LRE, consideration must be given to the particular handicap. For some pupils a residential placement may be the least restrictive.

> As to the requirement that handicapped children be placed in the least restrictive environment possible, we believe that this determination must include consideration of the particular handicap a student has. The regulations . . . specifically provided that a pupil was to be placed in "the least restrictive environment in view of the pupil's particular educational handicap." . . . (emphasis added). Current regulations make it even more clear that the goal of placing children in the least restrictive environment does not trump all other consideration: "Such a setting [the least restrictive environment] is selected in light of a pupil's special education needs." . . . For some pupils a residential placement may very well be the least restrictive. Considering S.G.'s language problems, for example, the district court could conclude that a residential placement where sign language is used is the least restrictive environment.[14]

DECISIONS ON LRE AND DEAF CHILDREN

Several other federal court and administrative due process decisions have weighed the role of LRE in a placement decision for a deaf child. If both the local public school and the residential school provide qualified teachers and a program that can benefit the deaf child educationally, courts and hearing officers often find the local school placement to be appropriate since it meets the LRE

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[14] EHLR 557:135 at 140 (3rd Cir.) (1985).

preference of the Act. A classic example of this is the decision in Springdale School District v. Grace.[15]

In this case a profoundly deaf child, Sherry Grace, had been from ages 4 to 6 in an oral hearing-impaired program where she made little or no progress. She was then placed in the State School for the Deaf in Little Rock, Arkansas, where she made significant progress in both her academic and social skills. She developed language skills through sign language and was developing both her confidence and communication skills. After 3 years, her parents moved away from Little Rock and enrolled her in the rural school district where they were then residing. The local school district wanted the child to remain in the state school, which all agreed was the best program for her. But the parents wanted her close to home. They requested their school district to provide a certified teacher of the deaf to teach Sherry in a one-on-one situation for all her academic classes. She would have contact with non-handicapped children for physical education, library and possibly classes in music and art. The hearing officers and courts all found that while she could possibly reach her full potential at the state school, the law did not require the best placement----only an appropriate one. With a certified teacher of the deaf, Sherry could benefit educationally from her classes at the local school and also have contact with non-handicapped children (which she could not, at that time, at the state school). The LRE preference

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[15] 693 F.2d 41 (8th Cir. 1982).

tilted the decision in favor of a local placement. The Eighth Circuit Court of Appeals disregarded the argument of the local school that it should not be required to provide a local placement at greater cost when the state already had an appropriate program at the state school. The court held that cost was not a controlling factor in light of the LRE provisions of the Act. In light of the Eighth Circuit's recent decision in A.W., cost may now be a significant factor. An interesting epilogue to this case is that Sherry Grace in her teenage years returned to the Arkansas School for the Deaf. This is consistent with the Commission's findings that students between the ages of 14 and 18 are now much more likely to move from local schools to special schools than the reverse.

In another federal court decision, a judge found that the appropriate placement for a deaf child was the Virginia School for the Deaf and not the local program favored by the parents[16]. The Court held that because of the child's severe language deficiency, the state school was the only appropriate placement. The Court concluded that even with the use of supplementary aids and services, her education in regular classes could not be achieved satisfactorily. She needed a 24-hour total immersion program where she would have a number of deaf peers and be in a learning environment every part of the day.

Language acquisition is a critical factor in evaluating a residential placement. A federal judge in Pennsylvania also found

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16 DeWalt v. Burkholder, EHLR 551:550 (1980).

that a deaf child with a severe language deficiency needed a 24-hour total immersion with other deaf persons. The judge colorfully pointed out:

> Championship prowess will sooner be attained if she concentrates on intensive training and learning to swim before she plunges unprepared into the turbulent mainstream. When her strokes are stronger, she will be able to make better headway in the water.[17]

Recently, another federal judge in Pennsylvania reached the same conclusion and relied in part on the findings of the Commission on Deaf Education. In Visco v. School District of Pittsburgh, a federal judge found that a private placement was appropriate for two deaf children, rather than a local hearing-impaired program. The Court stated:

> Mastery of language skills is vital to an adult in our society. The program at DePaul allows a hearing-impaired youngster to enter the tenth grade as any other pupil. It makes no sense to move Jennifer and Rene, risking loss of fundamental language skills which will prepare them for 10th grade, with the only possible benefit being several years of "mainstreaming": the benefits of which the Commission on Deaf Education has placed in serious doubt. Mainstreaming that interferes with the acquisition of fundamental language skills is foolishness mistaken for wisdom. This court firmly believes it is far better to prepare the handicapped to function in society as ordinary adults via special schools such as DePaul, rather than mainstreaming a youngster now with the possibility of producing an adult who might have to rely on social services later because he

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[17] Grkman v. Scanlon, 528 F.Supp. 1032 (W.D. Pa 1981), 3 EHLR 553:508 at 511 (1981).

> or she cannot communicate effectively. Nescient educational mainstreaming defeats the very purpose for which mainstreaming was conceived. The ultimate goal is to adequately prepare individuals for the mainstream of life.
>
> The instant case poses a particularly compelling illustration of this because Jennifer has only 2 years to go at DePaul and Rene has 4: after which, both Jennifer and Rene will be able to enter high school as any other 10th grader. To interrupt their studies with a different method of teaching in order to "mainstream" Jennifer and Rene for such a short period of time is definitely not worth risking the acquisition of language skills both children need to function as high school students as well as adults in society.[18]

Social and emotional needs are also controlling factors supporting a residential placement. In a California case,[19] the state hearing officer decided that a residential placement was necessary when the student's most important needs, of overcoming social and emotional difficulties, were not met at the public school. Although the deaf student could get appropriate academic training in either placement, her Individualized Education Program (IEP) required provision for social interaction and communication to address her emotional needs. The hearing officer found that to accomplish this goal she needed a large circle of deaf students and deaf role models in an environment she could fully understand. The hearing office concluded that the residential placement could meet this critical IEP

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[18] Civil Action No. 84-1377 (April 28, 1988).

[19] In re: Mt. Diablo Unified School District, EHLR 506:108 (1983).

goal.

CONCLUSION

The Education for All Handicapped Children Act, its Congressional intent and Regulation, and court decisions recognize that LRE is a preference. But LRE is not the "core value" of special education, as DOE insists. It is secondary to the paramount goal of the Act to provide an appropriate education that meets the unique needs of each handicapped child decided on through an individualized process. As a recent federal court of appeals has stated:

> [C]ourts . . . have determined that the Act's mainstreaming preference be given effect only when it is clear that the education of a particular handicapped child can be achieved satisfactorily in the...mainstream environment.[20]

It would be illegal to place all deaf children in residential schools, or to place all deaf children in regular schools. The overriding rule, as the Department of Education's own regulation stresses, is that placement decisions be made on an individual basis. The above discussion shows that residential schools should be and are a viable, legal option.

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[20] Lachman v. Illinois State Board of Education EHLR 441:156 (7th Cir. July 13, 1988).